Supreme Court, U. S.
FILED
JUL 23 1980
MICHAEL RODAK, JR., CLERK

No. 80-100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE LORAIN JOURNAL COMPANY,
THE NEWS-HERALD, AND J. THEODORE DIADIUN,

Petitioners,

v.

MICHAEL MILKOVICH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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Questions Presented

1. Is it consistent with the First and Fourteenth Amendments to the United States Constitution for a newspaper which has published an article containing an opinion which is held to "conflict with a judicial determination of the truth" rendered in a case to which the newspaper was not a party to be thereby deprived of the absolute protection afforded in libel cases for the expression of opinion?

2. Is it consistent with the First and Fourteenth Amendments to the United States Constitution for a newspaper which has published an article containing a purported statement of fact to be deprived of the defense of truth in a libel case because the statement is held to "conflict with a judicial determination of the truth" rendered in a case to which the newspaper was not a party?

3. Is it consistent with *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) for actual malice to be established against a newspaper on the basis of a "judicial determination of the truth" rendered in a case to which the newspaper was not a party?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Opinions Below

The journal entry and opinion of the Court of Common Pleas, Lake County, Ohio, granting the motion of defendants (now petitioners) to dismiss at the close of plaintiff's case, is unreported and is set forth in the appendix at pp. 1a-2a. The judgment entry and opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake reversing the determination of the Court of Common Pleas are unreported and are set forth in the appendix at pp. 3a-19a. The orders of the Supreme Court of Ohio dismissing defendants' appeal, overruling a motion for certification and denying rehearing with respect thereto are unreported and are set forth in the appendix at pp. 22a-25a.

Jurisdiction

This libel case commenced by plaintiff Michael Milkovich ("Milkovich") was tried to a jury commencing on April 10, 1978. After five days of trial and at the close of Milkovich's evidence, the motion of defendants for a directed verdict was granted (A. 1a-2a).* On appeal to the Court of Appeals of Ohio, Eleventh District, County of Lake, the decision was reversed by opinion dated December 3, 1979 (A. 5a-19a). An appeal as of right to the Ohio Supreme Court was dismissed on March 20, 1980 and a motion for certification overruled simultaneously (A. 22a-24a). Rehearing from the dismissal of the appeal and the overruling of the motion was denied on April 25, 1980 (A. 25a). Jurisdiction to hear this appeal is conferred on this Court by 28 U.S.C. § 1257(3) (1976).

Constitutional Provisions

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

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* References to "A. ....." are to the appropriate pages of the appendix to this petition.

Statement of the Case

This libel case arises out of the publication on January 8, 1975 by The News-Herald,* a newspaper with principal offices in Willoughby, Ohio, of a sports column written by journalist Ted Diadiun ("Diadiun"). The column commented on and expressed Diadiun's opinion regarding activities of Milkovich in his capacity as the wrestling coach of the Maple Heights High School team and later testimony of Milkovich with respect thereto.

Milkovich is concededly—unabashedly, in fact—one of the nation's outstanding coaches and a national sports figure. His coaching record is unparalleled throughout the nation. He advertises himself and his sons (in a brochure admitted into evidence) as "The Nation's Outstanding Wrestling Family" (T. 641-42; 729-30).** He was held in this litigation to be a public figure within the meaning of *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967) (A. 20a-21a) and did not appeal from that determination, nor, at any relevant time to this date quarrel with it.***

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* The Lorain Journal Company owns and publishes The News-Herald.

** References to "T. ....." are to appropriate pages of the transcript of the trial.

*** Milkovich has been inducted into the National Hall of Fame (T. 649) and the Ohio Coaches Hall of Fame (T. 649). He has been honored with citations in the Congressional Record (T. 588) and from both the Ohio House of Representatives (T. 651) and the Ohio Senate (T. 651). He has received the National Coach of the Year Award (T. 651-52), the United States Wrestling Federation Award (T. 588) and the Kent State University Hall of Fame Award (T. 588) and numerous other awards and honors. He was a national public speaker (T. 630, 632) and has conducted wrestling clinics throughout the country (T. 644, 646, 647). When questioned at the trial, Milkovich acknowledged that he knew of no other coach in the United States who approached his record (T. 641).

On February 9, 1974, a high school wrestling match was held between the teams of Maple Heights High School (coached by Milkovich) and Mentor High School (A. 7a). When a Maple Heights wrestler fouled his Mentor opponent, who claimed to be unable to continue, the referee awarded the match to Mentor (T. 176, 597-601). A riot then ensued in the Maple Heights gymnasium; spectators ran onto the gymnasium floor from the stands; a wrestler from the Maple Heights team attacked another from Mentor; a melee followed at the end of which several wrestlers were taken to the hospital for treatment of injuries suffered (A. 7a; T. 28, 98, 179, 192).

Diadiun attended the match and wrote articles about the riot criticizing Milkovich's conduct and that of the entire Maple Heights Coaching staff (A. 7a; T. 35-37). Subsequently, a public administrative hearing was held by the Board of Control of the Ohio High School Athletic Association ("OHSAA") regarding, *inter alia,* Milkovich's conduct at the wrestling match (A. 7a-8a). Diadiun attended that hearing, as a result of which Milkovich was severely censured for his conduct at the meet and during the ensuing riot (A. 7a; T. 99-101); the entire Maple Heights team was placed on probation for the 1975-76 school year (T. 131), and the team declared ineligible to compete in the state wrestling tournament (A. 7a; T. 99). The OHSAA twice reviewed requests by Milkovich, his team and other interested parties to lessen the penalties imposed. The Board refused to modify its prior ruling (T. 133).

A suit was then filed on behalf of a group of parents and high school wrestlers claiming that due process had not been afforded in the earlier hearing (A. 7a). Diadiun did not attend the hearing held by the Franklin County Common Pleas Court in that case (A. 8a). It was, however, described to him by Dr. Harold Meyer, Commissioner

of the Ohio High School Athletic Association (T. 50-56, 108-110; *see* A. 9a).

On January 7, 1975, the Common Pleas Court held that due process had not been afforded Milkovich and the wrestlers (A. 8a). On January 8, 1975, The News-Herald published Diadiun's column at issue in this litigation (A. 8a).* Under the heading "Maple beat the law with the 'big lie' ", the column offered, in its entirety, the following views:

> "Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.
>
> "It's not final yet—the judge granted Maple only a temporary injunction against the ruling—but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.
>
> "But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.
>
> "When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.
>
> "There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way—many are the lessons taken away from school by students which weren't learned

* A copy of the column is set forth in the appendix at page 26a.

from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

"Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out.

"If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

"The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott.

"Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Metor, and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

"Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

"But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible position of superintendent of schools.

"Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

"I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique poisition of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.

"Any resemblance between the two occurrences is purely coincidental.

"To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as 'shrugs,' and that Milkovich claimed he was 'Powerless to control the crowd' before the melee.

"Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

"Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

"But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"'I can say that some of the stories told to the judge sounded pretty darned unfamiliar,' said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. 'It certainly sounded different from what they told us.'

"Nevertheless, the judge bought their story, and ruled in their favor.

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not."

The Trial

On April 30, 1975, the libel complaint in this action was filed. Defendants answered and asserted that the article was privileged under the United States Constitution, that it was published with neither knowing falsity nor reckless disregard for its truth and that it was true (Defendants' Second Amended Answer). After pretrial proceedings were concluded, defendants moved for summary judgment (*see* A. 20a-21a). On May 23, 1977, the trial court held Milkovich to be a public figure, but denied the motion for summary judgment (A. 20a-21a). The action proceeded to trial by jury. After five days of trial and at the close of all of Milkovich's evidence, defendants moved for a directed verdict on the ground that Milkovich had failed to meet his burden, as a public figure, of proffering sufficient evidence from which the jury could conclude

that Diadiun's column had been published with reckless disregard of the truth (A. 6a; T. 735-758). After extended argument, the motion was granted, the Court ruling that:

> "The Court finds that reasonable minds can come but to one conclusion, to-wit: that the evidence (construed most strongly in favor of the Plaintiff) fails to establish by clear and convincing proof that the article which was the subject of this action was published with knowledge of its falsity or in reckless disregard of the truth, and that there is no justiciable issue for the jury." (A. 1a-2a)

The Decision of the Court of Appeals

Milkovich appealed to the Court of Appeals, Eleventh District, Lake County, which reversed. Its opinion relied entirely on the supposedly binding effect on the defendants in this libel case of the due process determination of the Common Pleas Court. As phrased by the Court:

> "In the instant case, a court of law, based on the evidence before it, and having the right to determine where the truth lay, even though on a due process question, determined the truth in favor of the plaintiff and the wrestling team he coached. Thus he had his day in court and was, at that time at least, exonerated by the only recognized arbiter of the truth in our American judicial system, but thereafter was still called a liar for the testimony he allegedly gave during that trial. Had the news article simply stated that the Court, in the newspaper's judgment, erred, or that the reporter's understanding of the facts differred from that of the Court, no question of libel would be before us now. *It would appear that, though*

the press might be at liberty to criticize the judicial process and the results of a given case, unless and until the judgment of the Court is overturned on appeal, the determination of what constitutes the truth has been made. Thus any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute 'actual malice' so as to be actionable libel of a public person." (Emphasis added) (A. 12a)

The Court then concluded that because the decision in the Milkovich due process case was contrary to views expressed by Diadiun in his column and was known to Diadiun, and since Diadiun had not attended the due process trial nor read the transcript of it, a jury question had been raised as to whether "the reporter and his newspaper acted with reckless disregard of truth" (A. 13a).

Thus, the effect of the decision is that the directed verdict entered in favor of the defendants has been reversed; the Milkovich libel trial is to proceed to be retried; but at the trial, the court is (a) not to permit the defense that the January 8, 1975 column was protected opinion (since even opinion, when contrary to that of a court, is deemed not to be the "truth"); (b) not to require plaintiffs to prove the falsity of the column and not even to permit the defense of truth (since the "truth", the Court held, had already been judicially established); and (c) not to entertain motions to determine, as a matter of law, that plaintiff cannot meet his burden of proving that the column was published with actual malice. The trial, the Court held, may focus on whether the statements now held to be "false" had been published with reckless disregard of truth

—but not on whether the statements were protected opinion or protected because they were true (A. 12a-13a). Judge Cook dissented, based on the demonstrated evidence that what Diadiun had written was opinion which he believed to be true (A. 16a-18a).

The Ohio Appeal and the Motion for Certification

Petitioners then sought review, by way of appeal as of right and by motion to certify the record, from the Ohio Supreme Court.* They urged upon that Court that the material in question was protected opinion and hence not subject to potential liability in a libel case (Appellants' Opening Brief to the Supreme Court of Ohio, Proposition of Law No. 5). They also urged that it was erroneous, and "a Constitutional issue of the first rank", for the appeals court decision to have held the due process determination to be "unassailable" (*id.* at 16-17).

The Ohio Supreme Court dismissed the appeal, concluding that "no substantial constitutional question exists herein" (A. 22a). The motion for certification was simultaneously overruled (A. 24a). Rehearing in the Ohio Supreme Court was denied on April 25, 1980 (A. 25a).

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* An appeal as of right was guaranteed in this case by virtue of Article IV, § 2(B)(2) of the Ohio Constitution which provides for such appeals in cases involving constitutional questions. The motion to certify the record is, under Ohio law, in the nature of a petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

The Determinations of the Ohio Courts Are Inconsistent With the Absolute Protection Afforded by the First Amendment With Respect to the Expression of Opinion and of Truthful Facts.

Throughout the years, this Court has made plain that, in an otherwise generally non-absolutist legal context, two principles of libel law are indeed absolute: one is that the expression of opinion is absolutely protected; the other is that the expression of truth is absolutely protected. The decision from which certiorari is sought rejects both those principles in favor of a third: as phrased by the Ohio Court of Appeals, it is that "any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute 'actual malice' so as to be actionable libel of a public person" (A. 12a).

If the Ohio Court were correct, no newspaper could accuse what it believed to be a wrongfully vindicated or acquitted person of a lie, not to say a crime, and defend a libel case on grounds of either opinion or truth, notwithstanding the fact that American and English common law have always permitted such a defense in just such circumstances. Whoever the subject of the article was and whatever the circumstances,* the result would be the same:

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* *See, e.g.*, W.F. McCaleb, THE AARON BURR CONSPIRACY 299 (1966) (concluding of Aaron Burr and his supporters' acquittals of high misdemeanors, that "[t]here seems to be not the slightest

in a libel case brought by any such person, the newspaper would be stripped of its constitutionally-guaranteed defenses. Moreover, if the lower court opinion were correct, no newspaper could safely voice any supposedly defamatory opinion about the conduct of a public figure in situations in which a court had expressly or inferentially rendered a favorable determination about that conduct.* Such is not the law and, as we demonstrate, it has never been the law. Yet it will remain the law in Ohio unless and until this Court determines to hear and adjudge the merits of this case.

The distinction between statements of opinion and those of fact is often not easy to make. *See generally* Schauer, *Language, Truth and the First Amendment,* 64 Va.L.Rev. 263 (1978). Yet the column at issue here appears to fall comfortably within the realm of pure opinion—*e.g.*, an expression in which "the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character." *Restatement (Second) of Torts* § 566, comment b (1977). In form, the column is a signed editorial; in substance, all the facts which support the

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doubt that Aaron Burr and his followers were all guilty"); R. Sullivan, GOODBYE LIZZIE BORDEN 205 (1974) (concluding that Lizzie Borden, acquitted of murdering her parents, "had, in the most barbarous manner, savagely butchered her elderly father and her docile stepmother"); A.R. St. John, FINAL VERDICT 455 (1962) (concluding that Clarence Darrow, acquitted of jury bribery, was "guilty as hell").

* We use the word "inferentially" advisedly in the context of the instant case since, as the opinion of the Court of Appeals suggests (A. 7a), the supposed vindication of Milkovich was, in fact, little more than a determination that he had been denied due process of law. For purposes of this appeal, however, we accept the lower Court's characterization of the determination of the results of the due process decision relating to Milkovich (*see* A. 12a).

opinion that Milkovich lied are set forth in the column. In such circumstances, it is plain that even if the opinion is deemed defamatory, it cannot be actionable since it does not "impl[y] the allegation of undisclosed defamatory facts as the basis for the opinion." *Restatement (Second) of Torts* § 566, *supra.* In fact, in numerous cases in which people have been accused of lying, it has been held that that expression was one of opinion and not of fact. *See, e.g., NLRB* v. *B. D. Holt Co.,* 516 F.2d 505, 507 (5th Cir. 1975) (statement by union that company president "is a liar" held to be opinion); *Smith* v. *Levitt,* 227 F.2d 855, 857 (9th Cir. 1955) (characterization of views of plaintiff as "an obvious concoction, a lie from the whole cloth" held opinion); *Hoag* v. *Charlotte Republican-Tribune,* 5 Med. L. Rptr. 1535, 1540 (Mich. Cir. Ct. 1979) (statement that individual had been convicted of crime "based on testimony and physical evidence supplied by Hoag that later turned out to be false" held opinion); *Craig* v. *Moore,* 4 Med. L. Rptr. 1402, 1403 (Fla. Cir. Ct. 1978) (characterization of mayor as a "deceptive individual who quite often misleads, if not blatantly lies to reporters from this radio station" held opinion). *And see Edwards* v. *National Audubon Society, Inc.,* 556 F.2d 113, 121-22 (2d Cir.), *cert. denied,* 434 U.S. 1002 (1977) (characterization of scientists as "liars" held opinion although characterization of scientists as "paid liars" considered one of fact).

If, as we suggest, the characterization of Milkovich as having lied is one of opinion, it is plain that the decision below is inconsistent with the rule of law established in prior rulings of this Court. Opinion, this Court has held, is absolutely protected. *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 339-40 (1974); *Old Dominion Branch No. 496, National Ass'n of Letter Carriers* v. *Austin,* 418 U.S. 264, 284 (1974).

Indeed, even if the column were deemed one of fact, the ruling would be equally inconsistent with governing law, since this Court has made clear that true statements of fact are also absolutely protected. *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 340-41; *Time, Inc.* v. *Firestone,* 424 U.S. 448, 458 (1976); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 490 (1975); *id.* at 497-500 (Powell, J., concurring); *Garrison* v. *Louisiana,* 379 U.S. 64, 72-73 (1964).

For the Ohio courts to construct an exception to these holdings in situations in which an expression is contrary to that reached by a court is, in the first instance, flatly contrary to the approach taken in a host of cases decided by this court emphasizing the freedom—and harshness—with which our courts may, with impunity, be criticized. Our society protects speakers from charges of criminal libel who go so far as to raise "interesting questions about the racketeer influences on our eight vacation-minded judges", *Garrison* v. *Louisiana, supra,* 379 U.S. at 66, and requires that truth be a defense in such circumstances. *Id.* at 72-73.* Newspapers are protected from findings of contempt when they criticize a court for committing a "travesty on justice" and for concluding that a losing party "seem[ed] to be getting a raw deal" and for urging that one-sided justice had been done, *Craig* v. *Harney,* 331 U.S. 367, 369-70 (1947). Judges may be accused of "outrageous" decisions, *Bridges* v. *California,* 314 U.S. 252, 276 (1941); of being guilty of "deplorable examples of race agitation" and speaking "in the style and language of a race baiting candidate", *Wood* v. *Georgia,* 370 U.S. 375, 379-80 (1962); and of seeking "every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify

* In *Garrison,* the Court did not determine whether the statements at issue were "factual or merely comment" (379 U.S. at 76 n.10).

prosecution," *Pennekamp* v. *Florida,* 328 U.S. 331, 339 (1946). All these are protected statements, even as arrayed against the serious societal interests set forth by dissenting members of the Court.* Yet the courts of Ohio have held that the far less inflammatory language present in this case may not even be defended, even on the basis of truth.

Nor is there any paucity of authority with respect to the protection that has historically been afforded to speakers or writers in defending libel actions (whether on the basis of opinion or truth) brought by successful litigants in earlier cases. At English common law, it has long been clear that "[t]he fact that the plaintiff has been acquitted of an offence does not preclude the [libel] defendant from setting up a plea of justification." *Gatley on Libel and Slander* § 1315 (6th ed. 1967). Prior to the adoption of our Bill of Rights, English courts recognized that "[t]hough the principal thief had previously been acquitted of the felony, it would be competent for the defendant in [the libel] cause to go into evidence to prove his guilt; because what had passed between other parties could not affect him. . . ." *Cook* v. *Field,* 170 Eng. Rep. 564 (1788). *See also England* v. *Bourke,* 170 Eng. Rep. 545 (1799) (where defendant accused a plaintiff, acquitted of murder, of being "a thief and a murderer," the court observed "had there been [justification], notwithstanding the acquittal, I would have tried the truth of the plea"); *Helsham* v. *Blackwood,* 138 Eng. Rep. 412, 418 (1851) ("an acquittal is not conclusive or any evidence of the innocence of the party, except where it is sought to punish him again for the offence: in a civil suit it is res inter alio").

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* *See, e.g., Wood* v. *Georgia, supra,* 370 U.S. at 396 (Harlan, J., joined by Clark, J., dissenting); *Craig* v. *Harney, supra,* 331 U.S. at 394 (Frankfurter J., joined by Vinson, C.J., dissenting); *id.* at 394 (Jackson, J., dissenting); *Bridges* v. *California, supra,* 314 U.S. at 279 (Frankfurter, J., joined by Stone, C.J., Roberts, J., and Byrnes, J., dissenting).

Illustrative of such cases is *Risk Allah Bey* v. *Whitehurst*, 18 L.T.R. 615 (1868), in which the court observed in a situation where a journalist had written of an individual acquitted in a murder trial that "a prisoner [who was] less clever and less prosperous . . . would on the same evidence have been convicted" (*id.* at 619), that

> "I quite agree that if, by some oversight or want of firmness on the part of the judge or jury, a great criminal escapes, and, by a miscarriage of justice, a scandal is brought on its administration and the criminal is let loose on society, rehabilitated and let loose when he ought to be suffering punishment—in such a case a public writer would be doing no more than his duty in coming forward to remonstrate with the tribunal through whose want of firmness the man has been acquitted. If that is done through that fair and reasonable exercise of judgment which the case demands, no jury ought to visit a public writer with damages because he has fairly and conscientiously discharged a public duty." *Id.* at 620.

The American rule has been precisely the same. *See generally* J. Townshend, *A Treatise on the Wrongs Called Slander and Libel and on the Remedy by Civil Action for Those Wrongs* § 354 (4th ed. 1890). In fact, under American common law, the general practice has been to exclude *all* prior judgments if offered to prove the truth of the facts upon which the judgment was based. Prior judgments have been, in effect, treated as a species of hearsay. 5 J. Wigmore, *Evidence* § 1671a, at 806-07 (Chadbourn rev. 1974).*

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* For copious case citations supporting the rule barring admission of prior convictions and acquittals into evidence in a subsequent case, *see* 4 J. Wigmore § 1346a (Chadbourn rev. 1974 & supp. 1980); Annot., 31 A.L.R. 261, 270 (1924); Annot., 57 A.L.R. 504 (1928); Annot., 80 A.L.R. 1145 (1932); Annot., 130 A.L.R. 690

This Court has repeatedly held that, absent privity in the prior action, parties in a subsequent civil proceeding are not bound by a judgment on the same facts rendered in a prior criminal action.* And, while the Federal Rules of Evidence have now adopted the policy of admitting felony convictions to prove the truth of the facts upon which the judgments rest (Fed.R.Evid. 803(22)), as before, neither criminal judgments of acquittal, nor prior civil judgments of any sort are so admissible. *See* 4 *Weinstein's Evidence* ¶ 803(22) [01] at 803-280 (1979).

Several venerable American cases have dealt directly with the issue of admitting prior acquittals into evidence

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(1941); 18 A.L.R. 2d 1287 (1951). *See also* Note, *Judgments As Evidence*, 46 Iowa L. Rev. 400 (1961); Note, 1962 Duke L.J. 97; Note, 35 Cornell L.Q. 872 (1950); Comment, *Evidence: Judgments: Res adjudicata: Admissibility of criminal judgment in a subsequent civil action*, 17 Cornell L.Q. 493 (1932); 29 Am.Jur. 2d *Evidence* § 335 (1967 & supp. 1979).

* *See Coffey* v. *United States*, 116 U.S. 436, 443 (1886) (a defendant's acquittal in a prior criminal prosecution is inadmissible in a subsequent civil action by a private plaintiff "for the reason that the parties are not the same"); *Stone* v. *United States*, 167 U.S. 178, 183-89 (1897) (defendant's acquittal in prior criminal action held inadmissible in subsequent civil action even where same parties were involved); *Murphy* v. *United States*, 272 U.S. 630 (1926) (despite acquittal on charges of maintaining a nuisance brought under the National Prohibition Act, the United States may sue to enjoin the same alleged nuisance under the civil provision of the Act); *Helvering* v. *Mitchell*, 303 U.S. 391 (1938) (where defendant's acquittal on a charge of willful attempt to evade tax held not a bar to assessment and collection of deficiency and surcharge thereon); *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485 (1950) (acquittal on charges of criminal conspiracy to violate § 3 of the Sherman Act not *res judicata* in subsequent civil action brought to enjoin defendants from price-fixing); *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232 (1972) (where owner of emerald stones and ring intervened to bar forfeiture action with his previous acquittal on smuggling charges; *held*, forfeiture action not barred because criminal acquittal not a determination that property was not unlawfully imported).

in subsequent civil libel actions. Consistent with the case law cited above, such acquittals have not even been held admissible, let alone binding.* Typical is *Corbley* v. *Wilson*, 71 Ill. 209 (1874). In that case, a slander plaintiff had been acquitted on charges of committing "a crime the most abhorrent to nature. . . ." *Id.* at 210. Following plaintiff's acquittal, the defendant again accused the plaintiff of having committed the crime. At the trial for slander, the plaintiff successfully introduced the record of his prior acquittal. This was held to be error by the Supreme Court of Illinois, because the slander defendant had not been a party to the first criminal proceeding. The Court was emphatic about the defendant's right to prove the truth of his allegations notwithstanding plaintiff's acquittal.

> "If the words were true, and of their truth the defendant had assumed the responsibility of establishing, which he had a clear right to do nothwithstanding the verdict of acquittal, the verdict and judgment had no place in the cause, for any purpose. If the charge was true, the defendant had a right to make it, and to stand by it, and it was no evidence of malice that he did make it, because a jury had acquitted him. The time may come when it will be for the best interests of the republic to make a public demonstration of the falsity of a verdict in a given case." 71 Ill. at 212.

Accord: Bilgrien v. *Ulrich*, 150 Wis. 532, 137 N.W. 759 (1912) (plaintiff's prior acquittal held inadmissible in slander action involving charge that plaintiff had, in fact, been guilty because defendant was not privy to the prior criminal

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* The only exception of which we are aware is *Rosenbloom* v. *Metromedia, Inc.*, 289 F.Supp. 737 (E.D. Pa. 1968), *rev'd on other grounds*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971). In *Rosenbloom*, however, the Court held that since evidence of the plaintiff's trial for obscenity had been introduced, so should the fact of his acquittal.

proceeding). *See also Fritchette* v. *Sumter Hardwood Co.*, 145 S.C. 53, 142 S.E. 828 (1928) (judgment in prior action where third parties had successfully recovered against plaintiffs for bad-faith business dealings inadmissible in libel action involving charge of same conduct); *Henderson* v. *Fox*, 80 Ga. 479, 6 S.E. 164 (1888) (judgment for plaintiff in prior action between identical parties wherein defendant had sought to recover embezzled funds was not a bar in slander action to defendant's proving truth of his subsequent accusation of embezzlement).

The error of the Ohio courts in affording conclusive weight to the determination in the *Milkovich* due process hearing is thus not only unprecedented but flatly contrary to long established constitutional commands. It is inconsistent with the clear holdings of this Court affording absolute constitutional protection to the expression of both opinion and of truthful speech; it is inconsistent with the case law permitting—and even encouraging—vigorous and uninhibited criticism and of disagreement with judicial rulings; it is at odds with centuries of rulings of both English and American courts.

And it is, as well, wholly inconsistent with the underlying principles of *New York Times* v. *Sullivan* itself. At the core of the *Sullivan* ruling, as this Court has frequently reiterated through the years, is the proposition that only the publication of knowing falsehoods or falsehoods published with reckless disregard of the truth are actionable. Reckless disregard, this Court has held, may only be proved by demonstrating that the defendants "entertained serious doubts as to the truth" of the publication, *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), or published with a "high degree of awareness of their probable falsity," *Garrison* v. *Louisiana, supra*, 379 U.S. at 74. *See generally, Herbert* v. *Lando*, 441 U.S. 153 (1979).

Yet in the instant case, reversal of the directed verdict was accomplished by affording irrebuttable and, in fact, conclusive weight to the judicial determination in the *Milkovich* due process decision—thus obviating the need to demonstrate "falsity" at all. Far from requiring Milkovich to prove the falsity of the statements at issue,* the Ohio courts have held that defendants may not even defend on grounds of truth. Nothing in the *Sullivan* ruling permits such a short-cutting of its protections.**

II.

The Decision of the Supreme Court of Ohio is a Final Judgment and in All Respects Ripe for Review.

The decision of the Supreme Court of Ohio dismissing the appeal for lack of a "substantial constitutional question" and, in effect, affirming the decision of the Court of Appeals is a final judgment for purposes of 28 U.S.C. § 1257 (1976).*** *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469

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* *Herbert* v. *Lando,* 441 U.S. 153, 156-57 (1979); *St. Amant* v. *Thompson,* 390 U.S. 727, 731-33 (1968); *Garrison* v. *Louisiana,* 379 U.S. 64, 74 (1964).

** The treatment by the Ohio courts of the requirement of demonstrating subjective awareness on the part of the defendants of probable falsity of the January 8, 1975 column is similar. A jury is now, *inter alia,* to adjudge the "reliability" of Dr. Harold Meyers—Commissioner of OHSAA—as a source of Diadiun's information about the due process hearing (A. 14a-15a). The relevant question, of course, is quite different in any case governed by *Sullivan.* It is not the "reliability" or credibility of a source as now adjudged by a jury; it is whether the reporter seriously doubted the source at the time he wrote his story. *St. Amant* v. *Thompson, supra.*

*** The writ of certiorari is being sought from the judgment of the Supreme Court of Ohio as dictated by decisions of this Court which hold that where, as here, an appeal as of right is taken to the state's court of last resort and the appeal is dismissed for lack of a substantial constitutional question, that judgment of dismissal

(1975); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). This Court has made clear that the finality requirement must be given a "practical" and "pragmatic" construction (*see, e.g., Cox Broadcasting Corp.* v. *Cohn, supra*, 420 U.S. at 486; *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)) and that in so doing, this Court looks "to the whole record" in assessing whether the requirement is satisfied. *Local 438, Construction Laborers* v. *Curry*, 371 U.S. 542, 551 (1963). An examination of the record here in light of the factors enunciated in *Cox* clearly demonstrates that this case is presently ripe for review.

In *Cox* this Court recognized that where, as here, final determination of a federal question had been made by the state court, but further proceedings in the state court might "obviate later review of the federal issue" (420 U.S. at 486 n.13), review is appropriate

> "if a refusal immediately to review the state-court decision might seriously erode federal policy. . . ." (420 U.S. at 483)

Here, as in *Cox*, the federal policy threatened by the state court determination is that of freedom of the press. Here, as there, state appellate review of the federal question has led to a remand for a state trial despite objections that the First Amendment precludes such a course. Here, as there, immediate review is the "best way to avoid 'the mischief of economic waste and of delayed justice.'" *Id.* at 479 (quoting *Radio Station WOW, Inc.* v. *Johnson*, 326

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is the "final judgment" for purposes of 28 U.S.C. § 1257. *See, e.g., Titus* v. *Wallick*, 306 U.S. 282 (1939); *Tumey* v. *Ohio*, 273 U.S. 510, 515 (1927); *Matthews* v. *Huwe*, 269 U.S. 262, 263-65 (1925).

U.S. 120, 124 (1945)). Indeed here, as there, immediate review could well put an end to the litigation.

It is true that petitioners could possibly prevail at the subsequent trial.* Yet again, the same situation was presented in *Cox*. Nonetheless, there the Court stated:

> "[E]ven if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments. Delaying final decision of the First Amendment claim until after trial will 'leave unanswered . . . an important question of freedom of the press under the First Amendment,' 'an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press.'" *Cox Broadcasting Corp.* v. *Cohn, supra,* 420 U.S. at 485-86 (citing *Miami Herald Publishing Co.* v. *Tornillo, supra,* 418 U.S. at 247 n.6).

This case presents none of the dangers of premature intrusion in state court proceedings. The Ohio courts have spoken finally and clearly.** Expressions of opinion and

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* Since defendants have been stripped of the constitutional protections accorded opinion and truth, they could only prevail at a subsequent trial on the ground that the "false" article was not published with reckless disregard for its truth or with knowing falsity. Exactly how defendants are to be permitted to do this is unclear from the Court of Appeals' decision. As such, this case may "once more wind its weary way back" to this Court. *Mills* v. *Alabama,* 384 U.S. 214, 217 (1966).

** All of the issues raised in this petition were urged, as well, before the Supreme Court of Ohio. By constitutional mandate, that court was required to review the merits of petitioners' claims.

(Footnote continued on following page)

truthful statements of fact by a newspaper are not to be accorded the protections of the First Amendment if they conflict with prior judicial determinations in cases in which the newspaper was not a party. Such a rule of law is, as we have demonstrated, totally at odds with long-established constitutional commands. The inhibiting effect of such a rule of law—its invitation to timidity and excess caution—is already real. As in *Cox,* the press (and other speakers) are already "operating in the shadow of the civil . . . sanctions of a rule of law . . . the constitutionality of which is in serious doubt . . . ." *Cox Broadcasting Corp.* v. *Cohn, supra,* 420 U.S. at 486. The decision of the Supreme Court of Ohio is final and the Court has jurisdiction to review it.

Ohio Const. Art. IV, §2(B)(2). *Compare National Socialist Party of America* v. *Village of Skokie,* 432 U.S. 43 (1977), where the Supreme Court of Illinois had, in its discretion, failed to remedy the deprivation of First Amendment rights at issue there. Nonetheless, because of the serious ramifications of the state court's failure to act, this Court accepted review.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment of the Supreme Court of the State of Ohio.

Respectfully submitted,

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Dated: July 23, 1980

APPENDIX

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Journal Entry of the Court of Common Pleas, Lake County, Ohio, Granting Defendants' Motion for a Directed Verdict

Court adjourned to Monday 5/1/1978, Court not pursuant to adjournment. Present and presiding, John F. Clair, Jr., Judge, John M. Parks, Judge, Ross D. Avellone, Judge.

IN THE

COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

Case No. 75 Civ 0301

JUDGE JOHN CLAIR

JOURNAL ENTRY

MICHAEL MILKOVICH, SR.,

Plaintiff,

VS.

THE NEWS-HERALD, *et al.*,

Defendants.

The Court, coming on to consider the Motion of the Defendants for a directed verdict in favor of the Defendants, which Motion was made at the close of the Plaintiff's evidence in the fifth day of trial, and upon consideration of the arguments of counsel, the Court finds that the Motion is well taken and that the said Motion should be and hereby is granted.

The Court finds that reasonable minds can come but to one conclusion, to-wit: that the evidence (construed most

Journal Entry of the Court of Common Pleas, Lake County, Ohio, Granting Defendants' Motion for a Directed Verdict

strongly in favor of the Plaintiff) fails to establish by clear and convincing proof that the article which was the subject of this action was published with knowledge of its falsity or in reckless disregard of the truth, and that there is no justiciable issue for the jury. Exceptions to the Plaintiff.

/s/ JOHN F. CLAIR, J.
Judge John F. Clair

Approved:

/s/ NATHAN SIMON
Attorney for Plaintiff

/s/ DAVID L. HERZER
Attorney for Defendants

[*Filed: May 1, 1978*]

Judgment Entry of the Court of Appeals of Ohio, Eleventh District, County of Lake

IN THE

COURT OF APPEALS

ELEVENTH DISTRICT

JUDGMENT ENTRY

Case No. 6-287

STATE OF OHIO,
COUNTY OF , *ss.*:

MICHAEL MILKOVICH,

Appellant,

VS

THE LORAIN JOURNAL COMPANY, ET AL.,

Appellees.

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the Trial Court is reversed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion which is incorporated hereby by reference.

No other error appearing in the record, judgment reversed and cause remanded for further proceedings. Cook, J., dissents. See Dissenting Opinion.

Judgment Entry of the Court of Appeals of Ohio, Eleventh District, County of Lake

It is ordered that appellant recover of appellee the costs herein.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ EDWIN T. HOFSTETTER
Judge Edwin T. Hofstetter
FOR THE COURT

(Connors, J., of the 6th Appellate District, sitting for Dahling, P.J.)

COOK, *J.*, Dissents

(See Dissenting Opinion)

[*Filed: December 3, 1979*]

Opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake

COURT OF APPEALS OF OHIO

ELEVENTH DISTRICT

COUNTY OF LAKE

COURT OF APPEALS CASE NO. 6-287

MICHAEL MILKOVICH,

Plaintiff-Appellant,

—VS—

THE LORAIN JOURNAL COMPANY, ET AL.,

Defendant-Appellees.

OPINION

DATED: December 3, 1979

JUDGES:

HON. EDWIN T. HOFSTETTER, *J.*; HON. ROBERT E. COOK, *J.*; HON. JOHN J. CONNORS, JR., *J.*, Sixth District, by Assignment, for HON. ALFRED E. DAHLING, *P.J.*

APPEARANCES:

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Opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake

HOFSTETTER, J.

The matter on appeal came on for trial before a jury. After the plaintiff-appellant rested his case, the defendants jointly moved the Court for a directed verdict in their favor on the ground that there is no justiciable issue for the jury, and that reasonable minds can come but to one conclusion, to-wit, that the proof fails to evidence by clear and convincing proof that the article which is the subject of this action was published with knowledge of its falsity or with reckless disregard as to its truth.

The trial court granted the motion in favor of the defendants, as follows:

> The Court finds that reasonable minds can come to but one conclusion, to-wit: that the evidence (construed most strongly in favor of the Plaintiff) fails to establish by clear and convincing proof that the article which was the subject of this action was published with knowledge of its falsity or in reckless disregard of the truth, and that there is no justiciable issue for the jury. Exceptions to the Plaintiff.

It is from this judgment, granting a directed verdict for the defendants, that plaintiff has appealed.

As background, the complaint in the court below was an action in libel filed by the plaintiff-appellant, Michael Milkovich, against the defendants, The Lorain Journal Publishing Company, owner and publisher of the Willoughby News-Herald, and Mr. Theodore Diadiun, as the result of the publication of a certain article on January 8, 1975. The article in question was stipulated at trial and admitted into evidence as plaintiff's Exhibit "D." (T.p. 12.)

Opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake

The events which led to the eventual publication of this alleged libelous article began on the evening of February 9, 1974, at a routine high school wrestling match between Mentor High School and Maple Heights High School. The latter team was coached by the now-retired Michael Milkovich, appellant herein. It appears that, during and shortly after a wrestling match between Bob Girardi of Maple Heights and Paul Pochatilla of Mentor High School, a melee broke out among the fans and spectators in the crowd, and among the wrestling participants themselves. One of the defendants, Ted Diadiun, a sportswriter for The News-Herald, wrote a series of articles following the occurrence.

Following the altercation, a series of hearings were conducted by the Ohio High School Athletic Association (OHSAA) in Columbus, Ohio, following which the Maple team was totally suspended from state competition, and the appellant, Michael Milkovich, was censured.

It was at this time that a group of parents and wrestlers filed suit in Franklin County Common Pleas Court in an action styled "Barret v. Ohio High School Athletic Association." It was held by that Court that the OHSAA failed to safeguard certain due process rights in suspending the team from state competition, thereby denying the team members of important property rights without due process of law.

Immediately after the announcement of Judge Martin's decision reinstating the Maple team to state competition, the defendants published the alleged libelous article which headlined, "Maple Beat The Law With The Big Lie."

Factually, therefore, it should be noted that, following the alleged melee between the Maple and Mentor wrestling

crowds, and as a result of hearings, the Ohio High School Athletic Association (OHSAA) suspended the Maple team from state competition. Defendant Diadiun attended both the wrestling meet between the two teams as well as the OHSAA hearing. The subsequent action against the OHSAA in Franklin County was brought to determine whether certain due process rights were accorded the Maple team before it was suspended from state competition. The defendant Diadiun did not attend that hearing. In the Franklin County trial had on November 8, 1974, the decision announced on January 7, 1975, as noted by the appellees in their brief, reversed the administrative action (of suspension). The reversal was on procedural grounds.

Pertinent to further discussion of defendants-appellee's publication on January 8, 1975, of the article which was headlined "Maple Beat The Law With The Big Lie" are the following statements made during the cross-examination of Diadiun:

> Q Now, when did you first become aware of the fact that this was a due process hearing and not a fault-finding hearing, if ever you became aware of it?
>
> A I thought that the fault-finding would be included in the trial, yes. I knew that due process was one of the issues. I also thought that one of the issues were (sic) whether or not—who was at fault.
>
> . . . . .
>
> Q Isn't it a fact, Mr. Diadiun, that you never read any transcript of what occurred at that trial until after you published the article?

A Yes.

. . . . .

Q Didn't you think it was necessary for you to read that decision (of Judge Paul Martin of the Franklin County Common Pleas Court) before you published such an article?

A Like I said, I knew the background of the whole case. I knew what Dr. Meyer told me went on at that trial. I didn't feel that I needed—

. . . . .

Q The fact of the matter is, you never took the trouble to find that decision and read it, did you?

. . . . .

A I didn't find the decision, no.

Q You didn't find it necessary to read it?

A No.

With the above as a fair predicate of the facts pertinent to our discussion of the directed verdict, the plaintiff-appellant assigned ten errors, as follows:

1. The Court erred in granting the motion of defendant-appellee for directed verdict at the close of testimony of the plaintiff;

2. The Court erred in its ruling that plaintiff failed to meet the burden of proof by clear and convincing evidence at the close of the testimony of the plaintiff, and that it was a necessary element for purposes of ruling upon a Motion For Directed Verdict;

3. The Court erred in its ruling that plaintiff was severely lacking in any evidence to prove defendants published the Article with "knowledge of its falsity";

4. The Court erred in its ruling by applying the incorrect law of Libel i.e. the Actual Malice test by omitting the proposition of law that the publisher acted with *"total disregard for truth or falsity"* and basing its findings exclusively upon the facts and law that plaintiff was severely lacking in any evidence to prove defendants published the Article with *"knowledge of its falsity"*;

5. The Court erred in failing to apply the legal standards set forth in Rule 50(A)(4), in ruling upon defendant's Motion For Directed Verdict;

6. Should the Appellate Court apply Rule 50(A)(4) to the trial proceeding and ruling in the lower court, then Appellant alleges the trial court erred in effect in its findings that:

   (a) That reasonable minds could not draw different inferences or conclusions from the evidence presented, relevant to the Actual Malice test i.e. knowledge of its falsity, and/or defendant's total disregard for truth or falsity;

   (b) That reasonable minds could come to but one conclusion, after construing the evidence most strongly in favor of the plaintiff, that there was no dispute, doubt, conflicting testimony, question, or any evidence in plaintiff's case to prove that defendant acted with Actual Malice i.e.

knowledge of its falsity, and/or total disregard for truth or falsity in publishing the alleged libelous publication.

7. The Court erred in denying appellant the right to introduce into evidence the transcript of the record of the case of Ray Barrett v. OHSAA in the Court of Common Pleas, Franklin County;

8. The Court erred in its ruling upon defendant's Motion for Directed Verdict, by failing to mention the requirement set forth in Ohio Rule 50(E); and in fact, not construing the evidence most strongly in favor of the plaintiff;

9. The Court erred in its ruling by holding in effect that there was no controversial evidence of any determinative issue for the jury to weigh and that to submit the case to the jury would permit them an opportunity to do unreasonable harm to the parties.

10. The Court erred in its ruling that the defendants acted upon a reliable source.

In the instant case we have some of the attributes of New York Times Co. v. Sullivan, 376 U. S. 254, 11 L. Ed. 2d 686. However, we have the additional element involved that the alleged lies spoken of in the news article were made after judicial ascertainment of where the truth lay as it concerned the trial in which the alleged lies were supposedly uttered.

The Sullivan case, as we understand it, stands for the proposition that a public official or person such as the plaintiff herein is prohibited from recovering damage for a

defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" —that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

All assignments except No. 7 and 10 direct themselves to the impropriety of granting the directed verdict. In furtherance of our above commentary, we hold that the trial court did err. In typical cases such as Sullivan, the libel alleged had still to be subjected to judicial process to determine whether libel existed. In the instant case, a court of law, based on the evidence before it, and having the right to determine where the truth lay, even though on a due process question, determined the truth in favor of the plaintiff and the wrestling team he coached. Thus he had his day in court and was, at that time at least, exonerated by the only recognized arbiter of the truth in our American judicial system, but thereafter was still called a liar for the testimony he allegedly gave during that trial. Had the news article simply stated that the Court, in the newspaper's judgment, erred, or that the reporter's understanding of the facts differed from that of the Court, no question of libel would be before us. It would appear that, though the press might be at liberty to criticize the judicial process and the results of a given case, unless and until the judgment of the Court is overturned on appeal, the determination of what constitutes the truth has been made. Thus any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute "actual malice" so as to be actionable libel of a public person. Whether, in a given case, it con-

stitutes a reckless disregard of the truth, is not, in our opinion, a question of law, but a question of fact based on the evidence before the Court.

Thus, where the evidence includes the factual data that (1) a decision was rendered by a trial court in Franklin County on a related matter, (2) that the defendant Diadiun acknowledged he knew such decision was rendered in favor of the plaintiff herein and his team of wrestlers, (3) that he did not attend that trial, and (4) that he did not read the transcript of that trial, it would appear that it is a jury question as to whether the reporter and his newspaper acted with reckless disregard of the truth.

We recognize that it has long been held that a motion for directed verdict raises a question of law only. Michigan-Ohio-Indiana Coal Assn. v. Nigh, Admx., 131 Ohio St. 405. Further if the facts are undisputed, this issue is one for the Court, but, where the circumstances are such that reasonable minds might reach different conclusions as to inferences to be drawn from the undisputed evidence, there arises a question of fact for the jury: Bennett v. Sinclair Refining Co., 144 OS 139, 29 00 223, 57 NE(2d) 776; Snider v. Rollins, 102 OS 372, 131 NE 733; Slyder v. Commissioners, 133 OS 146, 10 00 214, 12 NE(2d) 407; Yackee v. Napoleon, 135 OS 344, 14 00 231, 21 NE(2d) 111; Hamden Lodge v. Ohio Fuel Gas Co., 127 OS 469, 189 NE 246.

For the reasons indicated, we find all assignments, except No. 7 and 10, at least to the extent they relate to the order granting a directed verdict for the defendants, are well taken.

Assignment No. 7, in our opinion, is without merit. The trial judge in that case was the arbiter of the facts. It was his duty to weigh and decide what was determined by the

evidence. That determination having been made by that court, its judgment is final unless reversed on appeal. The question of whether the defendants had a justifiable basis for the publication of the "big lie" article so as to exonerate the defendants from either "actual malice" or such reckless disregard of the truth as to constitute malice as set forth in Sullivan, must, in our opinion, be predicated on the trial court's decision in that case and not on the evidence elicited therein.

Assignment No. 10, that the Court erred in its ruling that the defendants acted upon a reliable source, is well taken, although not for the reasoning expressed by the appellant. The reliability and believability of the source is for the trier of facts. Paragraphs 3 and 4 of the syllabus in O'Day v. Webb, 29 Ohio St. 2d 215, are pertinent, to wit:

> 3. A motion for directed verdict or a motion for judgment notwithstanding the verdict does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence.
>
> 4. It is the duty of a trial court to submit an essential issue to the jury when there *is* sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue, or, conversely, to withhold an essential issue from the jury when there *is not* sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue.

We think the trial court erred in considering the question of the reliability of the source of the "defamatory"

statements published when the basis for ruling on a directed verdict is not based on factual issues but on questions of law.

For the reasons indicated, the judgment of the trial court is reversed and the cause remanded for further proceedings.

/s/ (Illegible)
Judge Edwin T. Hofstetter

Cook, J., dissents (See Dissenting Opinion)

Connors, J., concurs
(Connors, J., of the 6th
Appellate District,
sitting for Dahling, P. J.)

Opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake

Cook, J. (Dissenting Opinion)

I respectfully dissent from the majority opinion of the Court.

The sole question in the instant cause is whether the trial court erred in granting appellee's motion for a directed verdict at the conclusion of the appellant's evidence.

Civ.R.50, in pertinent part, states:

> "(4) When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

A review of the evidence offered by the appellant in the proceedings below indicates reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion was adverse to the party against whom the motion was directed, the appellant.

The benchmark case in the libel law in the United States is New York Times v. Sullivan, 376 U.S. 254. In the New York Times case, the United States Supreme Court stated at pages 279-280:

> "The constitutional guaranty of freedom of speech and press prohibits a public official from recovering damages for a defamatory falsehood relating to his

> official conduct unless he proves that the statement was made with 'actual malice', that is, with knowledge that it was false or with reckless disregard of whether it was false or not; such a qualified privilege of honest mistake of fact is required by the First and Fourteenth Amendments."

In Curtiss Publishing Co. v. Butts, 388 U.S. 130 the United States Supreme Court extended the First Amendment safeguards of the New York Times case to those defending libel actions brought by public figures as well as public officials. Appellant was found by the trial court to be a public figure.

Here, the newspaper article written by Ted Diadiun of the Willoughby News Herald was based on what he had personally observed at the wrestling match where the incident occurred and the testimony he had personally heard appellant give at the hearing before OHSAA and what he had supposedly learned about appellant's testimony at a judicial hearing in the Franklin County Common Pleas Court from Dr. Harold Meyer, Commissioner of the OHSAA, in a telephone conversation. Diadiun concluded appellant had lied in the Franklin County court proceedings.

The important question is whether Ted Diadiun wrote his article with "actual malice" towards appellant, as required by the New York Times case. In other words, did Diadiun write his article knowing it was false or with reckless disregard of whether it was false or not.

At the conclusion of appellant's evidence in the court below, there was no evidence before the court that Diadiun wrote the article with "actual malice" against the appellant.

Rather, the evidence indicated Diadiun wrote the article based on his personal observations as to what occurred at the wrestling match and what appellant testified to at the OHSAA hearing in addition to what Dr. Meyer had indicated to him about appellant's testimony in court. Based on these sources of information, Diadiun expressed his opinion as to the statements of appellant in the Franklin County court proceedings. Appellant believed his article to be true.

I am of the opinion the article written by Diadiun falls within the limits of the court's words at page 269 of the New York Times case:

> "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion."

I would affirm the judgment of the trial court.

/s/ Robert E. Cook
Robert E. Cook, J.

[*Filed: December 3, 1979*]

Judgment Entry Errata

IN THE

COURT OF APPEALS

ELEVENTH DISTRICT

Case No. 6-287

JUDGMENT ENTRY ERRATA

STATE OF OHIO,
LAKE COUNTY, *ss.*

MICHAEL MILKOVICH,

Appellant,

— VS —

LORAIN JOURNAL CO., ET AL.,

Appellees.

It coming to the attention of this Court that an error exists on Page 3, Line 2 of the Dissenting Opinion of Judge Robert E. Cook, dated December 3, 1979, this Court sua sponte orders the Clerk of the Court of Lake County to strike the word "appellant" at said place in said Dissenting Opinion and, by pen, insert the word "appellee".

/s/ ROBERT E. COOK
JUDGE ROBERT E. COOK
FOR THE COURT

[*Filed: December 21, 1979*]

Judgment Entry in the Court of Common Pleas, Lake County, Ohio, Granting in Part and Denying in Part Defendants' Motion for Summary Judgment

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

No. 75 CIV 0301

MICHAEL MILKOVICH, SR.,

Plaintiff,

vs.

THE NEWS HERALD, et al.,

Defendants.

JUDGMENT ENTRY

May 23, 1977

This day this cause came on to be heard on the motion of the defendant for summary judgment, briefs of the parties, depositions and affidavits furnished by both parties.

Upon consideration the Court finds said motion well taken in part and not well taken in part.

First, the defendant seeks a finding that the plaintiff is a public figure within the meaning of *Curtis* v. *Butts,* 388 U.S. 130. The Court is of the opinion that it has been clearly shown that the plaintiff is indeed a public figure.

The defendant also seeks an order finding that there was no knowledge of falsity or reckless disregard of truth in this case. The Court finds the evidence to be conflicting and therefore not the subject for summary judgment.

Judgment Entry in the Court of Common Pleas, Lake County, Ohio, Granting in Part and Denying in Part Defendants' Motion for Summary Judgment

IT IS THEREFORE ORDERED that the request for summary judgment be granted to the defendant on the one issue of the public figure.

/s/ JOHN F. CLAIR, JR.
John F. Clair, Jr.
Judge of the Court of Common Pleas

Copies;

Nathan Simon, Esq.
Michael J. Occhionero, Esq.
William G. Wickens, Esq.
John J. Hurley, Jr., Esq.

Order of the Supreme Court of Ohio Dismissing the Appeal

THE SUPREME COURT OF OHIO

1980 TERM

To wit: March 20, 1980

THE STATE OF OHIO,
City of Columbus.

No. 80-107

MICHAEL MILKOVICH,

Appellee,

vs.

LORAIN JOURNAL COMPANY, ET AL.,

Appellants.

APPEAL FROM THE COURT OF APPEALS
for LAKE County

This cause, here on appeal as of right from the Court of Appeals for LAKE County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for LAKE County for entry.

Order of the Supreme Court of Ohio
Dismissing the Appeal

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this 15th day of July 1980

THOMAS L. STARTZMAN Clerk

/s/ SAM F. ADKINS Deputy

[Seal]

Order of the Supreme Court of Ohio Overruling the Motion for an Order Directing the Court of Appeals to Certify Its Record

THE SUPREME COURT OF OHIO

1980 TERM

To wit: March 20, 1980

THE STATE OF OHIO,
City of Columbus.

No. 80-107

MICHAEL MILKOVICH,

Appellee,

vs.

THE LORAIN JOURNAL COMPANY, ET AL.,

Appellants.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
for LAKE County
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Wiskinas, Herzer and Panza.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this 15th day of July 1980
THOMAS L. STARTZMAN Clerk
/s/ SAM F. ADKINS Deputy

[Seal]

Order of the Supreme Court of Ohio Denying Rehearing

THE SUPREME COURT OF THE STATE OF OHIO

1980 TERM

To wit: April 25, 1980

THE STATE OF OHIO,
City of Columbus.

No. 80-107

MICHAEL MILKOVICH,

Appellee,

vs.

LORAIN JOURNAL COMPANY, ET AL.,

Appellants.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. .... Page ....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 15th day of July 1980.

THOMAS L. STARTZMAN, Clerk.

by /s/ SAM F. ADKINS Deputy.

[Seal]

The Article In Issue

The News Herald

January 8, 1975

at 35, 39

(see opposite) ☞

Maple beat the law with the 'big lie'

By TED DIADIUN
News-Herald Sports Writer

Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

It's not final yet — the judge granted Maple only a temporary injunction against the ruling — but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.

TD Says

When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.

There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way — many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

Please turn to page 39

Milkovich takes aim at Columbus

COLUMBUS, Ohio (AP) — Maple Heights wrestling Coach Mike Milkovich says his team will be shooting for an unprecedented 11th state wrestling title following a judge's ruling yesterday allowing the team to compete.

Judge Paul Martin granted the high school a temporary injunction. The injunction stops the Ohio High School Athletic Association from enforcing a suspension against the team.

"We're all happy at Maple Heights," the coach said.

... Diadiun says Maple told a lie

(Continued from Page 35)

A lesson which, sadly, in view of the events of the past year, is well they learned early.

It is simply this: If you get in a jam, lie your way out.

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald and the Milkovich-Scott version presented to the board.

Any resemblance between the two occurances is purely coincidental.

To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as "shrugs," and that Milkovich claimed he was "Powerless to control the crowd" before the melee.

Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the si[illegible] board members were able to see through it.

28a

tournament after a hearing over a melee in a 1974 dual meet.

The Franklin County Comm.on Pleas Court judge ruled that the association had not followed due process in the hearing.

"Accordingly," he ruled, "the suspension from the StateHigh School Wrestling Tournament of the Maple Heights team is unconstitutional and hereby enjoined."

Carlisle Dollings, attorney for the association, said he could not comment on the decision until he had examined it and talked to the association. He declined to discuss the possibility of an appeal.

Commissioner Harold Meyer of the governor body of state scholastic sports was attending a National High School Federation winter meeting in Orlando, Fla., and could not be reached.

Maple Heights won an unprecedented 10th big school state wrestling championship last March after the Mustangs and visiting Mentor were involved in a regular season brawl.

Four Mentor wrestlers were hospitalized after the disturbance during a dual match at Maple Heights.

Following the incident, the OHSAA conducted a hearing before its state board of control and suspended the team from the 1975 tournament.

situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Metor, and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible poisition of superintendant of schools.

Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself

suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. "It certainly sounded different from what they told us."

Nevertheless, the judge bought their story, and ruled in their favor.

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.

Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not.